

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Buckeye Cablevision, Inc.)	MB Docket No. 13-317
)	
Complaint Seeking Forfeiture Order for)	CSR-8866-N
Violation of the Commission's Rules)	
)	
To: The Secretary's Office		
Attn: William Lake,		
Chief, Media Bureau		

REPLY

Clifford M. Harrington
Paul A. Cicelski
Tony Lin
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037
202-663-8000

Counsel for WNWO Licensee, LLC

January 24, 2014

Summary

In its Complaint, WNWO LLC, an NBC affiliate, provided evidence that Buckeye violated the Commission's network non-duplication rules by impermissibly transmitting the distant WDIV-TV, Detroit, Michigan signal (containing NBC network programming) to Buckeye subscribers in the Toledo, Ohio Designated Market Area. Nothing in Buckeye's Answer refutes WNWO LLC's evidence. To the contrary, Buckeye admits that it did, in fact, transmit to Buckeye subscribers in the Toledo market, for ten months, the unblocked, high definition signal of WDIV-TV on cable system channel 84.6 and separately, for more than two hours on December 16, 2013, the unblocked, standard definition signal of WDIV-TV on another channel. In its defense, Buckeye claims its actions were the results of an employee-initiated engineering "test" and an employee "misunderstanding," respectively. But, Buckeye cites no legal authority supporting its arguments that such excuses provide a valid basis for dismissing or denying the Complaint. To the contrary, long-standing Commission precedent is clear that Buckeye's actions (through its employees under the doctrine of *respondeat superior*) were both willful (because the acts were consciously and deliberately committed) and repeated (because the unblocked WDIV-TV signal was transmitted for more than one day), and accordingly, Buckeye violated the Commission's network non-duplication rules.

Even if the Commission were to consider Buckeye's feeble excuses, Buckeye fails to provide sufficient evidence to demonstrate that its factual claims regarding the "test" and "misunderstanding" are credible. For example, it is inconceivable that Buckeye had not considered that subscribers would directly connect their televisions to cable outlets and be able to access readily the purported test signal on cable system channel 84.6, especially when an admittedly substantial percentage of its subscribers (at least 30%) did not use cable set-top boxes. Indeed, the unrefuted evidence in the record supports that it was widely known in the

Toledo market by December 17, 2013 that the unblocked, high definition WDIV-TV signal easily could be viewed on channel 84.6 on the Buckeye system by any subscriber. Buckeye also makes no effort to explain why the test signal needed to be continuously transmitted for ten months or why the test signal could not have been limited to programming of WDIV-TV that did not duplicate that of WNWO-TV.

There is also no merit to Buckeye's arguments that WNWO LLC may not enforce its network non-duplication rights. Buckeye claims that such rights were forfeited because the station's network non-duplication protection letter was dated incorrectly and because the station did not request network non-duplication protection a second time, after the station was acquired in November 2013. But, again, Buckeye provides no basis in the Commission's rules or case law supporting its position. Buckeye's strained interpretation of the Commission's rules is also flatly refuted by the decades of established course of dealing between broadcasters and cable operators. For all of these reasons, WNWO LLC respectfully requests that the Commission expeditiously impose a significant monetary forfeiture and such other sanctions, as appropriate.

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Chief, Media Bureau

REPLY

WNWO Licensee, LLC ("WNWO LLC"), licensee of commercial television station WNWO-TV, Toledo, Ohio, pursuant to Section 76.7 of the rules of the Federal Communications Commission ("FCC" or "Commission"),¹ hereby submits this Reply to the Answer of Buckeye Cablevision, Inc. ("Buckeye") in the above-captioned complaint proceeding.²

Background

In its Complaint, WNWO LLC, an NBC affiliate, provided evidence that Buckeye willfully and repeatedly violated the Commission's network non-duplication rules on December 16, 2013 and December 17, 2013, and also likely for some unknown period prior to those dates by impermissibly transmitting the distant WDIV-TV, Detroit, Michigan signal (containing NBC network programming) to Buckeye subscribers in the Toledo, Ohio Designated Market Area ("DMA").³

¹ 47 C.F.R. § 76.7(c).

² See Answer, Buckeye Cablevision, Inc. (January 7, 2014) ("Answer"); *see also* Complaint Seeking Forfeiture Order for Violation of the Commission's Rules, WNWO Licensee, LLC (December 18, 2013) ("Complaint").

³ See Complaint, at 2-4 and accompanying Exhibits.

Buckeye's Answer. Buckeye admits in its Answer that it transmitted the WDIV-TV signal to its subscribers in the Toledo DMA without deleting or blocking the NBC network programming transmitted on WDIV-TV in both instances specifically identified by WNWO LLC in its Complaint, as well as for the ten months prior to those dates.⁴

Transmission of WDIV-TV on cable system channel 84.6. With respect to the unblocked transmission of WDIV-TV viewed by WNWO LLC (and undoubtedly many Buckeye Toledo DMA subscribers) on December 17, 2013, Buckeye admits that it transmitted the unblocked, high definition signal of WDIV-TV to subscribers in the Toledo DMA on channel 84.6 of its cable system and, further, that it had been doing so since February 2013, i.e. for ten months.⁵ Buckeye claims that it “transmitted the station’s signal on that frequency [channel 84.6] for purposes of testing the station’s signal.”⁶

In this regard, Buckeye provides the declaration of Lawrence Schmidt, the Systems Engineering Supervisor, a Buckeye employee of the past 14 years, who states that he established channel 84.6 as a test signal feed and that such actions fell within his scope of normal duties and did not require approval by his supervisors.⁷ Mr. Schmidt further states he is unable to provide the dates on which any signal tests were performed.

⁴ See Answer, at 5-6 (“Shortly after midnight [December 16, 2013], Buckeye’s Local Stations Operator executed this instruction [to remove the blocking from WDIV-TV’s signal], and sent an email to, among others, Ms. Widman, explaining that he had removed the blocks from WDIV-TV programming.”), at 3 (“In addition, between February and mid-December of 2013, Buckeye used channel 84.6 as a test feed of WDIV-TV.”).

⁵ *Id.* at 10-11.

⁶ *Id.* at 11.

⁷ See Declaration of Lawrence “Butch” Schmidt, attached as Exhibit 2 to the Answer, at ¶¶ 4, 7 (“Schmidt Declaration”).

Similarly, Mr. Schmidt does not provide any explanation why a continuous signal feed was necessary, how frequently tests were conducted, what (if any) corrective measures were taken as a result of such alleged tests, and whether or when the alleged signal quality issue was resolved. Nor does he explain why the WDIV-TV “test” signal was not limited to programming that did not duplicate the NBC network programming of WWNO-TV. Buckeye acknowledges that the practice of establishing a continuous signal feed for only “periodic future use,” and making it technically accessible to subscribers, not authorized under the FCC’s rules to receive it, “is not an optimal engineering practice.”⁸ Buckeye states that it is now committed to a new corporate approval process for such changes and that future test feeds will “be removed from operation as soon as the signal quality issue for which it is established has been solved” and “minimizes the possibility that unauthorized customers will be able to access the transmission.”⁹

Buckeye states that it did not advertise the availability of WDIV-TV on channel 84.6 and that cable subscribers using cable set-top boxes could not access that channel.¹⁰ Nonetheless, Buckeye acknowledges that any cable subscriber with a “QAM tuner” in their television could access channel 84.6 simply by directly plugging their television set to a cable outlet and tuning to that channel.¹¹ Buckeye claims that any such subscriber actions were “unauthorized.”¹² Buckeye claims that these facts support the conclusion that its actions with respect to the

⁸ Answer, at 12.

⁹ *Id.* at 13.

¹⁰ *Id.* at 11.

¹¹ *Id.* at 11; *see also* Declaration of James R. Brown, attached as Exhibit 6 to the Answer, at ¶ 4 (“Brown Declaration”).

¹² Answer, at 12.

transmission of the WDIV-TV signal on channel 84.6 to subscribers were not willful or repeated.¹³

Transmission of WDIV-TV on cable box channel 54. With respect to the unblocked transmission of WDIV-TV viewed by WNWO LLC on December 16, 2013, Buckeye concedes that it transmitted to its subscribers in the Toledo DMA on cable box channel 54¹⁴ NBC network programming, including the popular *Today* show, that aired between 7:00 AM and 9:00 AM.¹⁵ Specifically, Buckeye’s Supervisor of Local Stations Operations, Ms. Ninette Widman, states in her declaration: “WDIV-TV programming aired unblocked on Buckeye’s cable system serving Toledo customers for approximately 2 hours and 5 minutes.”¹⁶ Buckeye explains that the improper unblocking of Detroit station WDIV-TV into the Toledo DMA occurred because of a “misunderstanding” by the Buckeye “Community Channel Operator” in connection with an email sent by Ms. Widman.¹⁷

Specifically, Ms. Widman states: “[O]n December 13, I sent an informational email around to the weekend operators . . . [and] included in this email a note regarding the potential discontinuation of carriage of WNWO-TV and a direction to await further instructions regarding whether or not there would be any changes to the program blocking performed on WDIV-TV’s signal. I made it clear, both in my email and in oral instructions to the operators on duty that

¹³ *Id.* at 11-12.

¹⁴ Cable box channel 54 corresponds to cable system channel 84.7. *See id.* at 4.

¹⁵ *Id.* at 6.

¹⁶ Declaration of Ninette Widman, attached as Exhibit 3 to the Answer, at ¶ 7 (“Widman Declaration”).

¹⁷ Answer, at 5.

they should not change the channel blocking unless they received instructions to do so.”¹⁸

Buckeye does not provide a copy of this email or any statement by the Community Channel Operator, the individual identified as having taken deliberate actions to unblock the signal of out-of-market station WDIV-TV. In defense of its actions, Buckeye argues that these facts support the conclusion that its actions were not willful or repeated, as alleged by WNWO LLC,¹⁹ and that any improper transmission was “de minimis.”²⁰

WNWO-TV’s Network Non-Duplication Rights. As a technical legal matter, Buckeye argues that WNWO-TV did not correctly “perfect” its network non-duplication rights and that, accordingly, the Complaint must be dismissed because the station cannot assert those rights.²¹ First, Buckeye argues that the notification letter by WNWO-TV asserting network non-duplication rights (the “Notification Letter”)²² is defective on its face because it is dated March 25, 2013, two days before the March 27, 2013 amendment to the WNWO-TV network agreement, permitting WNWO LLC to assert such rights, was executed.²³

Buckeye also argues that WNWO-TV was required to reassert its network non-duplication rights by notifying Buckeye by letter again, when the station was acquired in November 2013.²⁴ Because WNWO LLC did not do so, Buckeye argues any valid non-

¹⁸ Widman Declaration, at ¶ 3.

¹⁹ Answer, at 11.

²⁰ *Id.* at 8.

²¹ *Id.* at 8-9.

²² The letter is attached as Exhibit 1 to the Complaint.

²³ Answer, at 8.

²⁴ *Id.* at 9.

duplication protection expired when the station was acquired.²⁵ Its sole legal support for this argument is Section 76.94(a)(1) of the Commission’s rules, which requires that non-duplication requests specify the “name and address of the party seeking non-duplication protection.”²⁶ For these reasons, Buckeye asks the FCC to dismiss or deny the Complaint, rather than investigating and issuing a forfeiture against Buckeye for its actions, as WNWO LLC requested in the Complaint.²⁷

Discussion

I. BUCKEYE’S TECHNICAL LEGAL ARGUMENTS THAT WNWO-TV HAS NO NETWORK NON-DUPPLICATION RIGHTS ARE MERITLESS

Buckeye’s claim that WNWO-TV prematurely sent the Notification Letter before the station had network non-duplication rights is totally speculative and without merit. WNWO LLC has already provided the declaration of Mr. Topf, the President and CEO of WNWO LLC, which states specifically that he “was personally aware that a non-duplication notice was sent to Buckeye Cablevision shortly after the most recent amendment to the network affiliation agreement between WNWO-TV and NBC.”²⁸ Further, the certified mail receipts associated with the Notification Letter plainly show that Buckeye received the Notification Letter on March 30, 2013, three days after the March 27, 2013 amendment to the WNWO-TV network agreement

²⁵ *Id.* at 9-10.

²⁶ *Id.* at 9 (citing 47 C.F.R. § 76.94(a)(1)).

²⁷ *Id.* at 13.

²⁸ Declaration of Christopher J. Topf, attached as Exhibit 3 to the Complaint, at ¶ 4 (“Topf Complaint Declaration”) (emphasis added).

was executed.²⁹ Thus, by the time Buckeye received and read the Notification Letter, the station was validly asserting its network non-duplication rights.

In contrast, Buckeye provides no evidence at all that the Notification Letter was received prior to the execution of the amendment between NBC and WNWO-TV or that the station does not have valid agreement with NBC allowing it to assert network non-duplication rights against Buckeye. Similarly, Buckeye does not suggest that it was, or even could have been affected, in any material way had the letter, in fact, been sent on March 25, 2013 (which WNWO LLC disputes).

Even if the precise date stated on the Notification Letter were somehow material in this case (which it is not),³⁰ simply because the Notification Letter was dated March 25, 2013 does not mean that it was actually sent on that day. WNWO LLC believes, based on the personal recollection of Mr. Topf, that the date on the Notification Letter is simply a typographical error, resulting from the advance preparation of a number of network non-duplication notification letters.³¹

There is also no basis for Buckeye's unsupported claim that WNWO-TV was required to reassert the station's network non-duplication rights in another letter to Buckeye when the station

²⁹ See Non-Duplication Notice Letters to Buckeye Cablevision, Inc., attached as Exhibit 2 to the Complaint. A second letter was also received by Buckeye on April 1, 2013, which of course is after March 27, 2013.

³⁰ Buckeye's reliance on *Northland Cable Television, Inc.*, 23 FCC Rcd 7872 (MB 2008) is misplaced. See Answer, at 9 n. 28. In that case, the Media Bureau concluded that the broadcast station in question did not properly assert its network non-duplication rights because it purported to assert those rights in an email, which did not satisfy 47 C.F.R. § 76.4. *Northland Cable Television, Inc.*, at ¶ 11.

³¹ See Declaration of Christopher J. Topf, attached as Exhibit A to this Reply, at ¶ 4 ("Topf Reply Declaration").

was acquired in November 2013.³² Buckeye’s single legal citation in support of its argument merely references the basic requirement that a notification letter to the cable operator include the name and address of the television station licensee.³³ A more complete reading of the network non-duplication rules shows that WNWO LLC was under no such obligation to reassert its network non-duplication rights when the station was acquired in November 2013.

The subsection cited only in part by Buckeye states in full that the notice should contain “[t]he name and address of the party requiring non-duplication protection and the television broadcast station holding the non-duplication right.”³⁴ Similarly, Section 76.94(a) provides that “[i]n order to exercise non-duplication rights pursuant to § 76.92, television stations shall notify each cable television system operator of the non-duplication sought.”³⁵ This language illustrates that the non-duplication right is associated with the station, and not specific to the party initially notifying the cable operator.³⁶

WNWO LLC is unaware of any Commission decision that holds that a new licensee is unable to rely on the prior licensee’s assertion of network non-duplication protection after a

³² Answer, at 9.

³³ *Id.* (citing 47 C.F.R. § 76.94(a)(1)).

³⁴ 47 C.F.R. § 76.94(a)(1) (emphasis added).

³⁵ 47 C.F.R. § 76.94(a) (emphasis added).

³⁶ Similar language in the Commission’s syndicated exclusivity rules further debunks Buckeye’s arguments. *See, e.g.*, 47 C.F.R. § 76.105 (“In order to exercise exclusivity rights pursuant to § 76.101, distributors or television stations shall notify each cable television system operator of the exclusivity sought”) (emphasis added). *See also Major League Baseball*, Memorandum Opinion and Order, 6 FCC Rcd 5573 (1991) (“The Commission’s program exclusivity rules allow television broadcast station licensees to contract for and exercise network program nonduplication rights. 47 C.F.R. §§76.92-76.93. That is, a station holding such rights, subject to proper notification and certain exceptions . . . may require that those ‘cable community unit[s] located in whole or in part within the geographic zone for a network program . . . shall not carry that program as broadcast by any other television signal. . . .’” (emphasis added)).

station purchase, and tellingly, Buckeye is unable to cite to any precedent to the contrary. Moreover, decades of the established course of dealing between broadcasters and cable operators regarding network non-duplication rights flatly refutes Buckeye's position.³⁷

II. BUCKEYE'S CARRIAGE OF NBC AFFILIATE WDIV-TV WITHOUT BLOCKING NETWORK PROGRAMMING VIOLATED THE FCC'S NETWORK NON-DUPLICATION RULES

Buckeye makes no effort to deny the facts underlying the Complaint and concedes that it did transmit to Buckeye's subscribers in the Toledo DMA the WDIV-TV signal in full. To justify its otherwise blatant violations of the FCC's non-network duplication rules, Buckeye claims that its transmissions were simply the results of an employee-initiated engineering "test" and an employee "misunderstanding," both of which have since been corrected or changed.³⁸ The Commission should reject Buckeye's feeble excuses.

A. An employee-initiated engineering "test" and an employee "misunderstanding" are not valid exceptions or defenses to the network non-duplication rules

The Commission has long held, under the doctrine of *respondeat superior*, that parties are fully responsible for the actions of their employees.³⁹ Thus, Buckeye cannot point the finger at its own employees to shield itself from liability. Such a policy is eminently appropriate here, where the employee's actions leading to the violations came about as direct and reasonable

³⁷ See Topf Reply Declaration, at ¶ 5.

³⁸ See *infra* Section II.A.

³⁹ See, e.g. *Eure Family Limited Partnership Owner of Antenna Structure Registration #1018162, Matthews County, Virginia*, 17 FCC Rcd 7042, at ¶ 7 (2002) ("[I]t is a basic tenet of agency law that the actions of an employee or contractor are imputed to the employer and the Commission has consistently refused to excuse licensees from forfeiture penalties where actions of employees or independent contractors have resulted in violations.") (internal quotations omitted); *Dial-a-Page, Inc.*, 8 FCC Rcd 2767, ¶ 9 (1993), *recon. den.*, 10 FCC Rcd 8825 (1995) (licensee responsible for a rule violation committed by an employee).

consequence of authority granted by Buckeye to one of its employees and approved actions taken by Buckeye management.

Thus, Buckeye must take full responsibility for the decisions of its fourteen-year veteran Systems Engineer Supervisor, Mr. Schmidt, who, according to Buckeye, initiated transmission of the unblocked, high-definition signal of WDIV-TV for ten months to Buckeye subscribers in the Toledo DMA.⁴⁰ According to Mr. Schmidt's declaration, his actions were within his scope of normal duties and did not need to be approved by his supervisors.⁴¹ After conveying such authority to Mr. Schmidt, Buckeye cannot now simply disown his actions.

The claims that Buckeye purportedly intended channel 84.6 to be used only for test purposes and did not advertise its availability to subscribers are immaterial. There are no such exceptions to the network non-duplication requirement in the FCC's rules,⁴² and tellingly, Buckeye cites no case law suggesting that any such testing exception exists.⁴³ Moreover, while Buckeye claims it had no such knowledge of the availability of WDIV-TV on channel 84.6 to its subscribers, it nonetheless reaped the benefit of its unauthorized transmission.⁴⁴

⁴⁰ Buckeye suggests in its pleading that NBC network programming on channel 84.6 "was not consistently" blocked, but it provides no declaration to support that claim. Answer, at 4. To the contrary, the sole person that admits to any knowledge of the transmission of WDIV-TV on channel 84.6 stated that he "did not establish any blocking for NBC programming." Schmidt Declaration, at ¶ 4.

⁴¹ Schmidt Declaration, at ¶ 7.

⁴² See 47 C.F.R. § 76.95 (specifying an exception to the network non-duplication rules only for cable systems with fewer than 1000 subscribers).

⁴³ See *infra* Section II.B (there is no requirement that a party violating the FCC's rules have any intent to violate the rules).

⁴⁴ For all these same reasons, Buckeye's assertion that its two-hour, unblocked transmission of WDIV-TV on channel 54 on December 16, 2013 was *de minimis* must also be rejected. Answer, at 8.

In any event, the Commission should not accept as credible Buckeye's claims of ignorance regarding the ready availability to its subscribers of WDIV-TV on cable system channel 84.6. It is simply disingenuous for Buckeye to imply that it had not considered that subscribers would directly connect their televisions to the cable outlet and be able to access channel 84.6 (or any other channel that Buckeye transmitted over its system) or that such subscriber actions were "unauthorized."⁴⁵ Indeed, the unrefuted evidence in the record supports that it was widely known in the Toledo DMA by December 17, 2013 that the unblocked, high definition WDIV-TV signal easily could be viewed on channel 84.6 on the Buckeye system by any subscriber.⁴⁶

Buckeye concedes that, at a minimum, 30% of all its subscribers do not use a cable set-top box.⁴⁷ But, that figure ignores the fact that subscribers are likely to have multiple televisions in a home, as Buckeye admits,⁴⁸ and may not, in fact, be using the provided cable set-top box at all. In effect, the actual percentage of subscribers that had accessed channel 84.6 is likely to be much higher. Although WNWO LLC does not know that exact percentage, it is without doubt substantial. Accordingly, it is not credible that Buckeye would not have realized that subscribers could, and would, plug televisions with QAM tuners, which are readily available to consumers,⁴⁹

⁴⁵ *Id.* at 12.

⁴⁶ See Topf Complaint Declaration, at ¶ 9.

⁴⁷ Answer, at 3; Brown Declaration, at ¶ 7.

⁴⁸ Answer, at 3, n.5.

⁴⁹ A subscriber merely had to connect a standard coaxial cable from a cable outlet into any television with a QAM tuner (Brown Declaration, at ¶ 7), which is the vast majority of televisions offered in the U.S. since 2006. See http://en.wikipedia.org/wiki/QAM_%28television%29 (last visited January 16, 2014); see also Topf Reply Declaration, at 7. Once the television scans for all of the available channels, the subscriber can readily access channel 84.6. See Brown Declaration, at ¶ 7.

into their cable outlets and access all the cable system channels transmitted by Buckeye, including channel 84.6.⁵⁰

Even if a technical exception to the network non-duplication rule exists, which WNWO LLC contests, Buckeye's continuous transmission of WDIV-TV's high-definition signal for a period of ten months, without any limitations or justification as to why such a lengthy period was necessary, would not meet any such exception. Indeed, Buckeye's remedial commitments for future testing, to remove test feeds as soon as possible and minimize subscriber ability to access such feeds, admits as much.⁵¹

Similarly, Buckeye should be responsible for the December 16, 2013 violation regardless of any employee "misunderstanding" because actions by Buckeye management led directly to the employee conduct. According to Buckeye, the Supervisor of Local Stations Operations, Ms. Widman, sent an email to her staff "regarding the potential discontinuation of carriage of WNWO-TV and a direction to await further instructions regarding whether or not there would be any changes to the program blocking performed on WDIV-TV's signal."⁵² Although Buckeye asserts the email was misunderstood, it cannot deny that the email, as described by Buckeye, contemplated, and urged employees to prepare for, the unblocking of the WDIV-TV signal from

⁵⁰ The Commission should also reject Buckeye's attempts to portray the subscriber process for accessing channel 84.6 as difficult. *See, e.g.*, Answer, at 12 (customer must have used QAM tuner to perform channel scan and discovered WDIV-TV); at 11 (customer must use QAM-capable TV to directly tune to channel 84.6).

⁵¹ *Id.* at 12-13.

⁵² Widman Declaration, at ¶ 3 (emphasis added).

Detroit to the Toledo DMA.⁵³ Thus, when the signal was actually unblocked, Buckeye could not have been surprised because it created the scenario for the “misunderstanding” to occur.

In any event, the evidence provided by Buckeye does not adequately support Buckeye’s claim that the unblocking resulted from an employee misunderstanding. First, Buckeye does not provide any declaration from the individual that unblocked the WDIV-TV signal, stating that he or she did so in error and not under instructions. Such a declaration is critical here because the declaration of Ms. Widman clearly allows for the possibility that someone with authority, other than Ms. Widman, issued instructions to unblock the WDIV-TV signal.⁵⁴ Second, Buckeye’s declarations make numerous references to various internal emails, including the email that generated the alleged misunderstanding, but Buckeye provides none of those emails.⁵⁵

To the extent the Commission finds this factual issue relevant to its enforcement decision, it should initiate an investigation or hearing into this matter or, at the very minimum, require Buckeye to provide all of the emails referenced in the Answer and Buckeye’s associated

⁵³ Buckeye does not, and cannot, explain why such an instruction ever went out, as there are no circumstances relating to the loss of the WNWO-TV signal due to a retransmission consent dispute which would invalidate WNWO-TV’s network non-duplication protection rights and thus permit Buckeye to change “the program blocking performed on WDIV-TV’s signal.” *Id.*

⁵⁴ *Id.* (“[O]perators on duty ... should not change the channel blocking unless they received instructions to do so.”) (emphasis added).

⁵⁵ *Id.* (“I included in this email a note regarding the potential discontinuation of carriage of WNWO-TV and a direction to await further instructions regarding whether or not there would be any changes to the program blocking performed on WDIV-TV’s signal.”) (emphasis added), at ¶ 4 (“When I returned to work at approximately 8:45 AM on Monday, December 16, 201, I reviewed an email that I had received at 4:32 AM that day from one of the weekend operators informing me that channel blocking had been removed from WDIV-TV until 11:00 PM”) (emphasis added).

declarations.⁵⁶ Additional information regarding those emails would shed light on the truthfulness of the alleged misunderstanding.

B. Buckeye's actions were willful and repeated

Buckeye argues that its actions were not violations of the FCC's rules because they resulted from an employee-initiated engineering test not intended to violate the FCC's rules and an employee mistake and, therefore, were not "willful" or "repeated."⁵⁷ Again, Buckeye's claims are without merit. The Commission has consistently held that, for purposes of its enforcement authority, "willful" is "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.⁵⁸ Similarly, "repeated" merely means that the act was committed or omitted more than once or lasts for more than one day.⁵⁹

Buckeye does not dispute that the company, through its employees acting within their authority, consciously and deliberately committed acts that resulted in the transmission of the unblocked WDIV-TV signal to Buckeye's subscribers in the Toledo DMA. Accordingly, under

⁵⁶ Buckeye should also be required to clarify its inconsistent statements regarding the timing of when the unblocking occurred, when Ms. Widman learned of the unblocking, and why the unblocking was set to expire at 11:00 PM on December 16, 2013. *See Answer*, at 5-6 ("Shortly after midnight, Buckeye's Local Stations Operator executed this [unblocking] instruction and sent an email to, among others, Ms. Widman, explaining that he had removed the blocks from WDIV-TV programming."); *cf.* Widman Declaration, at ¶ 4 ("I reviewed an email that I had received at 4:32 AM that day from one of the weekend operators informing me that channel blocking had been removed from WDIV-TV until 11:00 PM").

⁵⁷ *See Answer*, at 11.

⁵⁸ *See Southern California Broadcasting*, 6 FCC Rcd. 4387, at ¶ 5 (1991) (citing 47 U.S.C. § 312(f)(1)) ("Willful means that the licensee knew he was doing the act in question, regardless of whether there was an intent to violate the law") (emphasis added).

⁵⁹ *Dial-a-Page, Inc.*, 8 FCC Rcd 2767, ¶ 9 (1993), *recon. den.*, 10 FCC Rcd 8825 (1995) ("The term 'repeated', when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.").

FCC precedent, Buckeye's actions were both willful and repeated, and the Commission must conclude that Buckeye violated the Commission's network non-duplication rules.

Conclusion

For the reasons stated above and in the Complaint, WNWO LLC requests that the Commission impose a significant monetary forfeiture and such other sanctions on Buckeye, as appropriate, in light of Buckeye's willful and repeated violations of the Commission's network non-duplication rules.

Respectfully submitted,

/s/

Clifford M. Harrington

Paul A. Cicelski

Tony Lin

Pillsbury Winthrop Shaw Pittman LLP

2300 N Street, NW

Washington, DC 20037

202-663-8000

Counsel for WNWO Licensee, LLC

January 24, 2014

Exhibit A

Declaration of Christopher J. Topf

Declaration of Christopher J. Topf

1. My name is Christopher J. Topf.
2. I am President and CEO of WNWO Licensee, LLC, licensee of television station WNWO-TV, the NBC affiliate serving the Toledo, Ohio, television market.
3. WNWO-TV subscribes to the services of the Buckeye Cablevision, Inc. ("Buckeye") cable television system at our studios in Toledo.
4. As stated in my previous declaration attached to the WNWO complaint, I am personally aware that a network non-duplication letter was sent to Buckeye shortly after execution the most recent amendment to the network affiliation between WNWO-TV and NBC. While I do not specifically recall why the letter sent to Buckeye was dated March 25, 2013, I believe it was a mistake, resulting from the simultaneous, advance preparation of a number of network non-duplication notification letters that were drafted at that time.
5. I have worked in the broadcast industry for 20 years and consider myself an experienced broadcaster. In all these years, in my professional course of dealing with many cable operators, no cable operator, including Buckeye (except for now), has ever indicated that a party acquiring a station must reassert the non-duplication rights of that station after its acquisition. Similarly, during these years, in professional discussions with colleagues and other experienced broadcasters, I have never heard of any cable operator interpreting the FCC's rules in that manner.
6. As I noted in my declaration that was attached as Exhibit 3 to WNWO's Complaint, I heard on a radio station on the morning of December 17, 2013 that NBC programming was available by watching WDIV-TV on Buckeye's Toledo system. The radio program explained the process for doing so, which basically involved connecting a television to the cable outlet and entering channel 84.6 in the remote control. I followed these simple steps which took less than five minutes and, as previously stated in my declaration, was able personally to view the WDIV-TV signal being carried in high definition on channel 84.6.
7. The television I have in my office was purchased at a local electronics store and is widely available for purchase to consumers. It has a QAM tuner, which allows the television to view cable channels without a cable box, and was advertised as having that capability when it was purchased. It is my understanding based on general knowledge of the television industry and viewing habits of consumers that the majority of televisions that have been sold in the United States since 2006 are equipped with QAM tuners and that television viewers demand that functionality.

I hereby declare under penalty of perjury that the above statement is true and correct to the best of my knowledge and belief.

A handwritten signature in blue ink, consisting of stylized cursive letters, positioned above a horizontal line.

January 23, 2014

CERTIFICATE OF SERVICE

I, Sylvia Davis, a secretary with the law firm of Pillsbury Winthrop Shaw Pittman LLP, hereby certify that copies of the foregoing "Reply" was served via U.S. mail on this 24th day of January 2014 to the following:

Steven Broeckaert*
Media Bureau
Federal Communications Commission
445 12th Street, S.W., Room 4-A865
Washington, D.C. 20554

Mary Beth Murphy*
Media Bureau
Federal Communications Commission
445 12th Street, S.W., Room 4-A766
Washington, D.C. 20554

Simon Banyai*
Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Michael D. Basile
Jason E. Rademacher
Cooley LLP
1299 Pennsylvania Avenue, NW
Suite 700
Washington, D.C. 20004

_____/s/
Sylvia Davis

*Via Electronic Mail and Hand Delivery